Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

SADEQ NAJI AHMED,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether this Court should resolve a split among the Circuit Courts of Appeals regarding the interpretation of 18 U.S.C. § 1001 and the test for determining whether a question is ambiguous such that a defendant cannot be convicted for making a false statement in answer to the question.

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## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals affirming petitioner's conviction dated December 29, 2006, can be found at 472 F.3d 427. (App. 1).

## JURISDICTION

The Sixth Circuit Court of Appeals opinion was filed on December 29, 2006. Justice Stevens granted an extension to file this petition until May 14, 2007. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

## RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

### 18 U.S.C. § 1001

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to –

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

## STATEMENT OF THE CASE

On May 19, 2005, Petitioner, Sadeq Ahmed, was convicted by a jury in the United States District Court for the Eastern District of Michigan of two counts of making false statements in violation of 18 U.S.C. § 1001(a)(2).

On December 3, 1997, Ahmed enlisted in the United States Air Force for a four year term to be a fighter pilot. He received a security clearance and until his discharge on September 28, 2001, was the top junior enlisted troop at Eglin Air Force Base. His final discharge, effective September 28, 2001, was honorable. At no time did the United States Air Force seek a dishonorable discharge and, in fact, Ahmed could re-enlist without any restrictions. His discharge was subject to recall with no administrative disciplinary action.

While working as an airman at Eglin, Ahmed spoke to people around him about his feelings concerning the bombing and the killing of innocent women and children in his homeland. In November 1999, he allegedly stated to Sgt. Roswell that Osama bin Laden was his hero. At that time Sgt. Roswell also saw on Ahmed's computer an alleged picture of Osama bin Laden. Despite this, Ahmed was promoted to senior airman and he was given no reprimand. In March 2001, Ahmed also allegedly stated to a command officer that every aircraft "that flies over Iraq should crash." Again he said innocent civilians, women, and children were being killed and that was his concern. Finally, while the September 11th invasion was occurring, before anyone knew that Osama bin Laden was behind the attack, Ahmed made statements that the military maneuver was "brilliant."

Ahmed's original enlistment was for four years which would have terminated in December 2001. Prior to the attack on September 11, 2001, Ahmed had put in a request for a discharge that would have allowed him to be discharged in October or November of 2001. However, as a result of his alleged statements, on September 17, 2001, Ahmed was asked to report before the command officer,

Colonel Seroka. On September 17, 2001, after invoking his Fifth Amendment privilege not to say anything, he was removed from the 33rd Fighter Wing pending his honorable discharge ten days later on September 28, 2001. He was restricted to his quarters until his discharge on September 28, 2001. The government did not seek a dishonorable discharge nor did his commanding officer. Seroka said the circumstances required nothing but an honorable discharge. Seroka testified that he did not have the authority to suspend Ahmed's security clearance.

Immediately after Ahmed's honorable discharge, he began to work for a private company that cleared passengers boarding airplanes at Detroit Metropolitan Airport. Subsequently, the Transportation Security Administration requested that Ahmed make a new application. The purpose of the application was to ensure that the TSA workforce, employees, and contractors would have adequate background investigation so they could determine suitability and clearance eligibility. Ahmed was required to fill out a questionnaire for public trust positions.

On July 22, 2004, Ahmed was indicted in a two-count Indictment charging him with violation of 18 U.S.C. § 1001(a)(2) for answers he gave to two questions in the application. Count One stated as follows:

> On or about October 3, 2002, in the Eastern District of Michigan, Southern Division, Sadeq Naji Ahmed did knowingly and willfully make false, fictitious, and fraudulent material statements and representations in a matter within the jurisdiction of Office of Personnel Management, an agency of the executive branch of the

> government of the United States, in that in the Questionnaire For Public Trust Positions (Equivalent Standard Form 8SP) that the defendant submitted in conjunction with employment as a Transportation Security Administration Screener at Detroit Metropolitan Airport, **in response to question 12, Your Employment Record, Sadeq Naji Ahmed stated that he had not left a job under unfavorable circumstances, when in fact, as the defendant then well knew, he left his employment with the United States Department of the Air Force on September 28, 2001 under unfavorable circumstances, which included the following . . .**

The actual question twelve, as indicted in Count One, stated as follows:

> Has any of the following happened to you in the last seven years? If "Yes," begin with the most recent occurrence and go backward, providing date fired, quit, or left and other information requested.
>
> Use the following codes and explain the reason your employment was ended:
>
> 1. Fired from job
> 2. Quit a job after being told you'd be fired
> 3. Left a job by mutual agreement following allegations of misconduct
> 4. Left a job by mutual agreement following allegations of unsatisfactory performance
> 5. Left a job for other reasons under unfavorable circumstances

Count Two of the Indictment charged Ahmed as follows:

> THE GRAND JURY FURTHER CHARGES THAT:
>
> On or about October 3, 2002, in the Eastern District of Michigan, Southern Division, Sadeq Naji Ahmed did knowingly and willfully make false, fictitious, and fraudulent material statements and representations in a matter within the jurisdiction of the Office of Personnel Management, an agency of the executive branch of the government of the United States, in that the Questionnaire For Public Trust Positions (Equivalent Standard Form 85P) that the defendant submitted in conjunction with employment as a Transportation Security Administration Screener at Detroit Metropolitan Airport, **in response to question 18(b), Your Investigations Record, Sadeq Naji Ahmed stated that he had not had a security clearance or access authorization denied, suspended, or revoked, when in fact, as the defendant then well knew, his security clearance and access to classified information had been suspended on September 17, 2001 by the U.S. Department of the Air Force at Eglin Air Force Base in Florida** . . .

The actual question 18(b), as indicted in Count 2, reads as follows:

> To your knowledge, have you ever had clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? If "yes," give date of action and agency. **Note:** An administrative downgrade

or termination of security clearance is not revocation.

At trial and on appeal, Ahmed argued that his answers were literally true and that the questions were ambiguous such that the Indictment should have been dismissed. The trial court disagreed, the Sixth Circuit affirmed Ahmed's convictions and Ahmed now petitions this Court for a writ of certiorari.

## REASONS FOR GRANTING THE PETITION

**This Court should resolve a split among the Circuit Courts of Appeals regarding the interpretation of 18 U.S.C. § 1001 and the test for determining whether a question is ambiguous such that a defendant cannot be convicted for making a false statement in answer to the question.**

In both the trial court and the Sixth Circuit Court of Appeals, Ahmed argued that the Indictment was insufficient because his statements were literally true and that the questions posed to Ahmed were so ambiguous that the Indictment failed to charge an offense.

Count One of the Indictment charged Ahmed with knowingly and intentionally making a false statement "that he had not left a job under unfavorable circumstances, when in fact the defendant well knew, that he left his employment with the United States Department of the Air Force on September 28, 2001, under unfavorable circumstances." Count One, paragraph (g) of the Indictment also stated that Ahmed was honorably discharged from the Air Force. Therefore, Ahmed argued that the answer to question twelve was literally true and Ahmed,

having been honorably discharged from the Air Force, did not leave his employment under unfavorable circumstances.

In Count Two of the Indictment, Ahmed was alleged to have stated that he had not had a security clearance or access authorization denied, suspended, or revoked when, in fact, Ahmed well knew his security clearance and access to classified information had been suspended on September 17, 2001, by the Air Force.

Ahmed argued that he in fact answered this question with a literally true answer because the note to the question stated that "[a]n administrative downgrade or termination of security clearance is not revocation." Because Colonel Seroka testified that he was not authorized to suspend Ahmed's security clearance, Ahmed relied on a reasonable interpretation of the question that rendered his statement literally true.

There is a consensus in federal law that a prosecution for making a false statement cannot be sustained for a statement that is, on its face, literally true. *See United States v. Gahagan*, 881 F.2d 1380, 1383 (6th Cir. 1989). In *Gahagan,* for example, the defendant's conviction for his denial of ownership of a vehicle was reversed because "on its face it was not a false representation given the transferred title to the vehicle prior to the certification." *Id.* at 987. In *Bronston v. United States,* 409 U.S. 352, 93 S. Ct. 595, 34 L.Ed.2d 568 (1973), this Court held that the general federal perjury statute did not reach a witness's literally true but unresponsive answer, even if the witness intended to mislead his questioner by the answer and even if the answer is arguably "false by negative implication." *Id.* at 357-360.

The holding in *Bronston* has been used by the lower courts to permit a literal truth defense to a false statements charge. Directly related to the literal truth defense is the defense that the question was ambiguous. A defendant might argue that his statement was literally true under one interpretation of an ambiguous question. The ambiguity of the question can be an independent basis for a defense on the theory that no prosecution can be sustained for any answer to an ambiguous question. Whatever the precise posture of the defense, the core of the literal truth and the ambiguity defenses is the meaning of ambiguity. The circuit courts have not agreed on a test for ambiguity. Some circuits require a "fundamental ambiguity" that prevents any consensus on meaning between reasonable people. Under this theory, a prosecution can proceed even if a statement has more than one reasonable interpretation as long as the government can prove that the defendant knowingly answered falsely to one of the interpretations. The conflicting test does not permit prosecution for any question that has more than one reasonable interpretation.

The Sixth Circuit followed the stricter rule, holding both that the statements were not literally true and that the questions were not fundamentally ambiguous. The court stated that "Ahmed has in no way demonstrated that his statements were facially true. His contention amounts only to an assertion that under *some* conceivable interpretation of the questions, his answers would not have been false." 472 F.3d at 432 (App. 6-7). The court found that Ahmed was relying on unstated premises in the questions to support his claim that the answers were literally true. *Id.* (App. 7). The court further found that a defendant cannot rely on unstated premises to invalidate

a prosecution under the statute. *Id.* (App. 7). In other words, the court did not allow Ahmed to rely on the fact that there was more than one reasonable interpretation of the questions.

Regarding Ahmed's argument that the questions were ambiguous, the court cited Sixth Circuit and Third Circuit law that only "fundamentally ambiguous" questions provide a defendant with a defense; the court defined fundamentally ambiguous as a question "without meaning 'about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by questioner and answerer.'" *Id.* at 433 (App. 8-9) (*United States v. Damrah,* 412 F.3d 618, 626 (6th Cir. 2005) (quoting *United States v. Ryan,* 828 F.2d 1010, 1015 (3d Cir. 1987)). The Sixth Circuit concluded that Ahmed could defend against the charges on the theory that his belief that he was honorably discharged and that Colonel Seroka could not suspend his security clearance, but that these defenses had to be presented to the jury as factual issues. *Id.* (App. 8).

The test for what is an ambiguous or a "fundamentally ambiguous" question is not settled in the circuit courts. The Ninth Circuit noted the split in a 2004 case. In *United States v. Camper,* 384 F.3d 1073 (9th Cir. 2004), the court affirmed the conviction of a man for making a false statement when applying for a job concerning security clearance as a ramp agent at Los Angeles International Airport. *Id.* at 1074. Camper had been convicted of a misdemeanor firearm charge, but when filling out his application checked "no" to the question that asked whether he had been convicted of unlawful possession of a weapon. *Id.* Camper argued that his answer was literally true because the question was ambiguous. *Id.* at 1075.

The *Camper* court noted that the Ninth Circuit "distinguishes between answers that contain some ambiguity and those that are fundamentally ambiguous." *Id.* at 1076. "A question is fundamentally ambiguous when men of ordinary intelligence cannot arrive at a mutual understanding of its meaning." *Id.* (quoting *United States v. Culliton,* 328 F.3d 1074, 1078 (9th Cir. 2003)). "Some ambiguity" alone does not render a perjury conviction invalid. *Id.*

The *Camper* court noted that the Fourth Circuit uses a different test for ambiguity. In a similar case regarding statements on an application for airport security clearance, the Fourth Circuit affirmed the dismissal of a false statement indictment. *United States v. Good,* 326 F.3d 589 (4th Cir. 2003). The *Camper* court distinguished *Good* on its facts, but also found "[a] far more compelling basis for distinguishing *Good* [is] that the Fourth Circuit takes a very different approach to ambiguity" than the Ninth Circuit. *Id.* at 1077.

> Even if we were to accept the Government's argument that the per diem clause is ambiguous, which would be the best that could be said for the Government's argument, the result would not be different from [reversal conviction.] To be ambiguous a contract must be susceptible of at least two reasonable constructions. When the Government concedes that the clause is ambiguous, it necessarily concedes that the defendant's construction of the per diem clause, which is one of the constructions, is reasonable. Such a conclusion requires a ruling that the defendants cannot be convicted under § 1001 for a statement or billing that may be said to be accurate within a reasonable construction of the contract. This is so

> because one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract.

*United States v. Race,* 632 F.2d 1014, 1020 (4th Cir. 1980) (quoted in *Camper,* 384 F.3d at 1078). The *Camper* court concluded that the Ninth Circuit permits conviction for a false statement even when a question has "two plausible meanings" if the government can prove that "the defendant understood one such meaning and answered falsely to it[.]" *Id.* at 1078.

The Sixth Circuit follows the stricter fundamental ambiguity rule described by the Ninth Circuit. This split has persisted for many years in the circuit courts without resolution.

Ahmed's answer to the question as to whether he had left a job under unfavorable circumstances was literally true under one reasonable interpretation of the question. As was testified to by Col. Seroka, the government did not seek a dishonorable discharge nor did his commanding officer. Seroka testified that the events did not meet anything but an honorable discharge.

As to Count Two, the actual question was:

> To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? If "yes," give date of action and agency. **Note:** An administrative downgrade or termination of security clearance is not revocation.

Seroka testified that he did not have the authority to revoke the Defendant's security clearance and that was

done through a separate organization. The Air Force Central Adjudication Facility is the only authority that has the authority to grant, suspend, deny or revoke personal security clearance. The colonel testified that he did not suspend the Defendant's security clearance, but terminated his access to secured areas as part of his discharge decision. The interpretation by his colonel was there was no suspension of his security clearance. It was reasonable for Ahmed to rely on the note on question 18(b) that said, "[a]n administrative downgrade or termination of security clearance is not revocation."

The Sixth Circuit disagreed with Ahmed's arguments, holding both that the statements were not facially true and that the questions were not fundamentally ambiguous. Ahmed prays that this Court grant his petition for writ of certiorari to resolve the standard for ambiguity under a prosecution for violation of 18 U.S.C. § 1001.

Respectfully submitted,

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472 F.3d 427

United States Court of Appeals, Sixth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Sadeq Naji AHMED, Defendant-Appellant.
**No. 05-2319.**

Argued: Nov. 28, 2006.
Decided and Filed: Dec. 29, 2006.

**ARGUED:** Richard M. Lustig, Richard M. Lustig Law Office, Birmingham, Michigan, for Appellant. Cathleen M. Corken, Assistant United States Attorney, Detroit, Michigan, for Appellee. **ON BRIEF:** Richard M. Lustig, Richard M. Lustig Law Office, Birmingham, Michigan, for Appellant. Cathleen M. Corken, Assistant United States Attorney, Detroit, Michigan, for Appellee.

Before: BOGGS, Chief Judge; COOK, Circuit Judge; and CARR, Chief District Judge.*

## OPINION

BOGGS, Chief Judge.

Sadeq Ahmed was indicted on two counts of making false statements in violation of 18 U.S.C. § 1001(a)(2), based on written answers he gave about his employment history as part of his background investigation for a baggage screener position with the Transportation Security Administration (TSA). After a jury trial resulted in guilty verdicts on both counts, the district court sentenced him to 18 months of imprisonment. Ahmed now appeals

* The Honorable James G. Carr, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

his conviction, alleging insufficiency of the indictment and evidentiary errors; and his sentence, alleging that the district court's imposition of a sentence above the guidelines range was unreasonable. We affirm.

I

In December 1997, Sadeq Ahmed enlisted in the United States Air Force, and was stationed at Elgin Air Force Base in Florida, where he was assigned to the Operations Support Squadron of the 33rd Fighter Wing. His responsibilities included analyzing performance and capability information relating to F-15 fighters and pilots, and required security clearance.

In March 2001, Ahmed authored and circulated a document defending Usama bin Laden as a victim of religious persecution, and accusing the United States of acts of terrorism, for, among other things, the use of atomic weapons at Hiroshima and Nagasaki, bombing of Iraqi civilians, imposing sanctions on Iraq, and supporting the "terrorist state" of Israel. He further indicated, in statements to other servicemen, that he believed all aircraft flying over Iraq should crash, a statement understood to apply to the United States aircraft then enforcing no-fly zone restrictions. In a discussion of his document and statements with his supervisor, Ahmed indicated that, if the United States went to war with Iraq, he would have to fight on the Iraqi side. On other occasions, he verbally contemplated the possibility of fighting against, and killing, United States soldiers should the United States become involved in a conflict that violated his religious beliefs, and that he would like the opportunity to fight in the noble cause of his hero, bin Laden.

As the events of September 11, 2001, unfolded, Ahmed, watching the destruction on television in the company of his colleagues, remarked that the attacks were a "beautiful sight," and later commented that the United States deserved the attacks because of its support for Israel, and that he was very happy about what had happened. By this time, the Operations Support Squadron commander, Col. Steven Seroka, had been aware for several months that Ahmed's statements were causing concern to his superiors. After being informed of Ahmed's comments on September 11, Seroka asked Ahmed's superiors to speak with him to determine his loyalties. His superiors met with Ahmed to discuss the matter on September 13, and reported back to Seroka that Ahmed had specified his loyalty to his family and religion, but had not included the United States or its military among his loyalties, and had stated that he was neither for or against the September 11 attacks.

On September 17, 2001, Ahmed was ordered to "report in," a formal meeting with his full chain of command that is governed by an established protocol. At the meeting, Seroka informed Ahmed that he was suspending his access to classified information, and prohibited him from entering the area of the 33rd Fighter Wing. Seroka read Ahmed a "Notification of Suspension of Access," which indicated that a determination had been made to suspend his access to classified information and unescorted entry into restricted areas. Ahmed signed and retained a copy of this notification. Ahmed also signed a "Security Termination Statement," which indicated his "termination of access to all classified information," and a document entitled "Restriction from 33 Fighter Wing." Ahmed was relieved of his duties with the Operational Support Squadron, and

assigned to another squadron in another part of the base, which involved no access to classified information. He was escorted from the meeting to his former worksite to gather his personal belongings, and escorted to his new station. At the time of the reporting in, Ahmed had been scheduled for discharge on December 2, 2001.

After the meeting, Seroka was concerned that stop loss would be implemented before that date, thus potentially deferring Ahmed's discharge, and asked Ahmed's new chain of command to discuss an earlier discharge date with him. Seroka subsequently approved an advancement of Ahmed's discharge date to September 28, 2001. Subsequent to his discharge on that date, Ahmed was mailed his final performance evaluation, and returned a mailed acknowledgment of receipt. In this evaluation, Ahmed's immediate supervisor, Sgt. Sharpe, rated Ahmed positively on a number of points relating to his duties, but categorized his "conduct on/off duty" as "unacceptable," and did not recommend his promotion "at this time." The report also included extensive comments from Seroka, indicating that the ratings did not "fully capture or document the magnitude of SrA Ahmed's disloyal, near seditionist behavior," providing considerable detail regarding Ahmed's history in this regard, and recommending a more critical evaluation in specific categories. Seroka testified at trial that, on advice of military lawyers, he did not seek a dishonorable discharge.

After his discharge, Ahmed worked for a private company providing baggage and passenger screening services at Detroit Metropolitan Airport. In October 2002, the TSA took over screening functions, and Ahmed was transferred to TSA, conditional on his completion of a security background investigation. As part of that investigation, Ahmed

completed a "Questionnaire for Public Trust Positions," developed by the Office of Personnel Management. Section 12 of the form asked whether the applicant had, within the last seven years, been

> 1-Fired from job; 2-Quit a job after being told you'd be fired; 3-Left a job by mutual agreement following allegations of misconduct; 4-Left a job by mutual agreement following allegations of unsatisfactory performance; 5-Left a job for others *[sic]* reasons under unfavorable circumstances
>
> Ahmed checked "no". Section 18b of the form asked:To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? If "yes," give date of action and agency. note: An administrative downgrade or termination of security clearance is not a revocation.
>
> Ahmed checked "no."

On July 21, 2004, Ahmed was indicted on two counts of making false statements, in violation of 18 U.S.C. § 1001(a)(2), based on these responses. On May 19, 2005, the jury returned a guilty verdict on both counts. The district court calculated a guidelines range of zero to six months of imprisonment, and imposed a sentence of 18 months. Ahmed filed a timely notice of appeal.

## II

Ahmed argues that his indictment failed to allege an offense under 18 U.S.C. § 1001 because his answers to the questions were literally true or, alternatively, that the vagueness of the questions precludes a finding his responses

constituted false statements.[1] Ahmed raised an objection to count 1 of the indictment, relating to his answer in Section 12, in his motion to dismiss, but raises his objection to count 2, relating to his answer in Section 18, for the first time on appeal. We review the sufficiency of an indictment *de novo,* but as to the second count, because it was unchallenged below, we construe the indictment "liberally in favor of its sufficiency." *United States v. Perry,* 438 F.3d 642, 651 (6th Cir.2006).

Ahmed's argument rests on the contention that, because he was honorably discharged, his denial of "unfavorable circumstances" surrounding his departure from the Air Force was literally true; and that because his security clearance had not been revoked (an action outside of Col. Seroka's authority), his answer to the second question was literally true in light of its instruction that an "administrative downgrade or termination . . . is not a revocation." Ahmed is correct as a legal matter that a § 1001 indictment "premised on a statement which on its face is not false" is fatally defective, insofar as a false statement is an element of the crime. *United States v. Gatewood,* 173 F.3d 983, 986 (6th Cir.1999) (quoting *United States v. Gahagan,* 881 F.2d 1380, 1383 (6th Cir.1989)).

However, Ahmed has in no way demonstrated that his statements were facially true. His contention amounts only to an assertion that under *some* conceivable interpretation of the questions, his answers would not have

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[1] Ahmed briefly mentions the argument he made below in his motion to dismiss, that Count 1 of the indictment "was void for vagueness and overbredth [*sic*] and, therefore unconstitutional," but does not appear to renew that argument on appeal. We thus consider it abandoned. *Dillery v. City of Sandusky,* 398 F.3d 562, 569 (6th Cir.2005).

been false. He argues, in effect, that because "unfavorable circumstances" could be construed to exclude an honorable discharge, and because the restrictions placed on his classified access after his reporting in could be construed to be an "administrative downgrade or termination," his answers are literally true. Our cases have not directly addressed this type of contention in a § 1001 context, but as a matter of logic, this is a far cry from a demonstration of facial truth. As other courts have observed in the analogous context of perjury prosecutions, the possibility that a defendant "can postulate unstated premises of the question that would make his answer literally true" does not bar the possibility of liability. *United States v. Cuesta,* 597 F.2d 903, 920 (5th Cir.1979); *see also United States v. Kehoe,* 562 F.2d 65, 68 (1st Cir.1977) ("We do not believe that the possibility that the defendant understood the questions to be limited to one particular incident raises an issue of literal truth."). Rather, his argument only raises a jury issue as to a reasonable interpretation of the question and his *actual* understanding.

The § 1001 cases Ahmed relies on to support his contention of facial truth are inapposite. In *Gatewood,* the defendant was charged with falsely certifying that he had made "payments" to subcontractors, when he had in fact made payments that covered only part of what was owed. In *Gahagan,* the defendant was charged with falsely denying ownership of a vehicle, when he had legally transferred title to the vehicle before making that representation (although apparently he still had effective control of the vehicle). In both cases, this court found the indictments to be defective, insofar as the statements in question were facially true: construing the responses in these cases as *false* would have required an unstated

premise (in *Gatewood,* that "payments" meant "full payments," and in *Gahagan,* that "ownership" meant something other than legal title). This case presents precisely the opposite situation, where unstated premises are required to construe Ahmed's answers as *true.*[2]

Ahmed's alternative argument, that the vagueness of the questions renders it impossible to conclude that he answered them falsely, is similarly unavailing. Even if the interpretations of the questions Ahmed claims to have had in mind when he answered are plausible-i.e., even if the questions exhibited some conceivable degree of ambiguity-"a defendant's 'understanding of the question is for the jury to resolve in the first instance.'" *United States v. Damrah,* 412 F.3d 618, 626 (6th Cir.2005) (citing *United States v. Farmer,* 137 F.3d 1265, 1269 (10th Cir.1998)). Indeed, a false statement charge under § 1001, like a perjury charge, effectively demands "an inquiry into the Defendant's state of mind and his intent to deceive at the time the testimony was given," and "the entire focus of a perjury inquiry centers upon what the testifier knew and when he knew it," in order to "establish[] beyond a reasonable doubt that he knew his testimony to be false when he gave it." *United States v. DeZarn,* 157 F.3d 1042, 1049 (6th Cir.1998). Short of a question that is "fundamentally ambiguous" – one "without meaning 'about which men of ordinary intellect could agree, nor one which could be used

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[2] Ahmed also invokes *Bronston v. United States,* 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), in support of his "literal truth" claim, but the literal truth defense articulated in *Bronston* specifically concerns *non-responsive* answers that are literally true, even if clearly intended to deceive. Ahmed, however, has given no reason to suggest that his answers here were similarly non-responsive-indeed, an answer of "no" hardly could be.

with mutual understanding by a questioner and answerer,'" *Damrah,* 412 F.3d at 626 (quoting *United States v. Ryan,* 828 F.2d 1010, 1015 (3d Cir.1987)) – Ahmed's actual understanding of the questions is a matter for the jury. Although the questions at issue here may indeed be broad, there is no basis to conclude that they display the kind of fundamental ambiguity that would invalidate the indictment. *See id.* at 627 (noting the distinction between ambiguity and breadth).[3]

## III

Ahmed further claims that he was denied his right to a fair trial as a result of two alleged evidentiary errors during his trial. Neither of these claims merits reversal.

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[3] The distinction between non-responsiveness and faux ambiguity can be seen in an analogy to the *Bronston* case. When Bronston was asked whether he had ever had a Swiss bank account and he answered, "The company had an account there for about six months . . . ," 409 U.S. at 354, 93 S.Ct. 595, the answer was non-responsive but, as the court held, not false. On the other hand, had Bronston answered "no" because he had in mind the possible ambiguity that a "Swiss" bank account would be one made out of chocolate, it would properly have been a question for the jury as to whether that alleged interpretation was either plausible, or actually in his mind, rather than a post hoc rationalization.

Here, in the same fashion, it is possible that a person could think that there is no circumstance other than a dishonorable discharge that would constitute "unfavorable circumstances," but similarly, whether that interpretation was reasonable or actually in the defendant's mind is a matter for the jury. The same applies to Ahmed's other answer, where it could be possible that, even after having been given a piece of paper that says "a security determination has been made to suspend your access to classified information," a person could believe that his access authorization had not been suspended, but that too is a matter for the jury. *See DeZarn,* 157 F.3d at 1049.

A

At trial, Inga Tibbs, an Assistant Director in TSA's Personnel Security Division, testified for the prosecution about the agency's determination of Ahmed's employment suitability, and the role his answers to the Questionnaire played in that determination. As part of that testimony, she indicated that the information provided by the Office of Personnel Management suggested to the TSA that Ahmed had not been honest in his answer to Section 12 of the Questionnaire, and that this conclusion influenced their employment suitability determination. At trial, Ahmed objected to this line of questioning on the ground that it was more prejudicial than probative; on appeal, he argues instead that admission of this testimony was improper lay opinion under Fed.R.Evid. 701, and-apparently without noting the inherent contradiction-improper "ultimate issue" expert testimony under Fed.R.Evid. 704(b). Insofar as his argument on appeal is based on grounds not asserted at trial, we review for plain error. *United States v. Reed,* 167 F.3d 984, 989 (6th Cir.1999).

Ahmed's Rule 704(b) argument is completely without merit: the rule by its terms applies to expert witness testimony, and Tibbs was not testifying as an expert witness.

Fed.R.Evid. 701 permits lay opinion testimony where it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The testimony here clearly meets these criteria. Tibbs was directly involved in

the determination of Ahmed's suitability for continued employment, and testified based on her personal knowledge of the TSA's evaluation of Ahmed's answers, thus satisfying the first condition. *See Torres v. County of Oakland,* 758 F.2d 147, 149 (6th Cir.1985) (the "foundational requirement of personal knowledge" is satisfied when the witness was "privy to the details" of the events in question). Tibbs's testimony was elicited to prove that Ahmed's answers were material to the agency's determination that he was unsuitable for employment-an element of a § 1001 offense, and one that was disputed at trial by the Ahmed, who argued that the TSA conducts its own investigation and would base its decision on that, rather than his answers-and thus clearly helpful to a determination of a fact in issue. *See United States v. Steele,* 933 F.2d 1313, 1319 (6th Cir.1991) (a statement is material under § 1001 if it has a tendency to influence a function entrusted to a governmental agency). Finally, there is no suggestion that Tibbs' testimony was based on any kind of specialized knowledge.

Ahmed correctly notes that this court disfavors lay opinion testimony when it consists of a legal conclusion, citing *Torres* for the proposition that "testimony containing a legal conclusion . . . conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury . . . invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law." 758 F.2d at 150 (internal quotation marks and citations omitted). However, we also "accord a relatively wide degree of discretion in admitting or excluding testimony which arguably contains a legal conclusion . . . because it is often difficult to determine whether a legal conclusion is implicated in the testimony." *Ibid.* Tibbs's testimony that

Ahmed answered falsely at most amounts to an extremely ambiguous case. Falsity is an element of a § 1001 offense, and in that respect her testimony implicates a legal conclusion. However, such an ambiguity is resolved by "determin[ing] whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular," *ibid.*, and there is no suggestion in the record that Tibbs's testimony was anything other than a non-technical expression of her informed opinion that Ahmed had given false answers on his Questionnaire, and that such opinion was material to the agency's determination of Ahmed's suitability for employment. No limiting instruction was sought as to the proper use of her testimony.

B

Ahmed also argues that the trial court erred in admitting Col. Seroka's testimony regarding his exercise of his right to remain silent during his September 17 "reporting in," in violation of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). His argument misses the point of *Doyle,* which held that it was a due process violation to use post-arrest silence "to impeach an explanation subsequently offered at trial." *Id.* at 618, 96 S.Ct. 2240. Ahmed's silence in 2001, by contrast, did not relate to the matter for which he was charged and tried – his answers on the questionnaire in 2002 – rendering this case plainly outside the scope of *Doyle.*

Ahmed also contends that the trial court erred by not permitting cross-examination of Col. Seroka concerning the contents of a written statement Ahmed made after his reporting in (where he had been given 72 hours to respond

in writing), and in not allowing the document itself to be introduced. On cross-examination, Seroka testified that Ahmed had submitted a response, but that it did not address the issues and concerns raised at the reporting in. At trial, Ahmed sought to overcome a hearsay objection to introducing the document and testimony concerning its contents on the grounds that he sought to impeach Seroka, by showing that the documents did indeed address his concerns. On appeal Ahmed suggests that the document was not hearsay, for reasons that are not clearly articulated, but which in any case cannot be correct. To the extent that Ahmed merely sought to prove that he had addressed the concerns raised at the reporting in, the contents of the letter itself add nothing to the testimony elicited from Col. Seroka on cross-examination, and introducing the contents could only have been useful as proof of the assertions made therein. Ahmed suggests no applicable exception to the general inadmissibility of hearsay, Fed.R.Evid. 802.

IV

Ahmed argues that the district court's imposition of an 18-month sentence, where the relevant guidelines range was a prison sentence of zero to six months, was unreasonable. He asserts that the district court failed to consider adequately the sentencing factors set out in 18 U.S.C. § 3553(a) by not considering his education, career in the Air Force, and expression of his First Amendment rights. A review of the record, however, indicates the contrary. The district court noted Ahmed's excellent service record prior to the incidents that led to his early discharge, considered the continuing education Ahmed was engaging in at the time (and indeed allowed Ahmed to

report for his sentence after his graduation), and explicitly addressed Ahmed's allegation that the sentence and the charges were in retaliation for protected but unpopular speech or opinions. The trial court further explained in detail its belief that the guidelines range largely contemplated false statements in the context of financial or other similar fraud rather than in a public safety or national security context, and that a false statement in the latter context was considerably more serious, warranting greater punishment based on gravity and the need for deterrence. Given that the trial court in fact addressed the § 3553(a) factors that Ahmed considered relevant, and that there is no indication that it failed to consider any other relevant factors, we consider the sentence to be procedurally reasonable. *See United States v. McBride,* 434 F.3d 470, 475-76 & n. 3 (6th Cir.2006).

Ahmed does not develop an argument that his sentence was substantively unreasonable, beyond his request that this court direct the trial court to "resentence him in accordance with the Guidelines," a request that clearly misapprehends the post-*Booker* role of the Sentencing Guidelines by implying that they remain mandatory. *See United States v. Booker,* 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Although we do not accord a presumption of substantive reasonableness to sentences outside the guidelines range (as we do for sentences within it), neither do we accord them a presumption of substantive unreasonableness. *United States v. Ferguson,* 456 F.3d 660, 664-65 (6th Cir.2006). Beyond his (incorrect) allegation that the trial court failed to consider pertinent factors, and the assertion, addressed by the trial court, that his unpopular speech was impermissibly considered as a factor, Ahmed offers no reason to conclude that his sentence was

substantively unreasonable. Indeed, the sentence was grounded in the trial court's clearly articulated, well-reasoned concerns about the seriousness of the crime and the need for deterrence, did not accord "an unreasonable amount of weight to any pertinent factor," and was not selected arbitrarily. *United States v. Webb*, 403 F.3d 373, 385 (2005).

V

For the foregoing reasons, we AFFIRM the district court's judgment.